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IN THE

Supreme Court of the United States

..... Term, 1968

No. 416

JOHN A. EPLING,

Petitioner,

vs.

THE OHIO STATE BAR ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

Supreme Court of the United States

..... Term, 1968

No. ——

JOHN A. EPLING,

Petitioner,

vs.

THE OHIO STATE BAR ASSOCIATION,

Respondent.

Petitioner herein, John A. Epling, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered June 19, 1968.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported as Ohio State Bar Association v. Epling, 15 Ohio St. 2d 23.

STATEMENT OF JURISDICTION

The decree of the Supreme Court of Ohio was entered June 19, 1968, Motion for rehearing was denied by entry of the Supreme Court of Ohio dated July 10, 1968. A copy of the opinion rendered by the Supreme Court of Ohio is appended hereto identified as appendix A. A copy of the decree indefinitely suspending petitioner from the practice of law is appended hereto identified as appendix B. This case came before the Supreme Court of Ohio on Findings of Fact and Recommendations of the Board of Commissioners of the Supreme Court of Ohio which were certified to the Supreme Court of Ohio on January 9, 1968 and a

copy of said Findings of Fact and Recommendations is appended hereto identified as appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) and this Court's rule 19 (a), inasmuch as the petitioner has been denied due process of law under Amendment XIV to the Constitution of the United States and his rights have been violated by admission of evidence obtained by unreasonable search and seizure in violation of Amendment IV to the Constitution of the United States and by admission of evidence in violation of the self-incrimination clause of Amendment V to the Constitution of the United States.

QUESTIONS PRESENTED

1. May an attorney be disenfranchised in state court proceedings by reason of the application of Canons 29 and 32 of the Canons of Professional Ethics to the banking practices of that attorney which the court concluded tended to bring the legal profession into disrepute in view of the indefinite, vague and uncertain language of said Canons?

2. Where under Rule of State Supreme Court which provides that an attorney who has once received a public reprimand shall upon being found guilty of subsequent misconduct receive at least an indefinite suspension and said Rule provides that Commissioners hear and report findings and make recommendation to the State Supreme Court, may an attorney be indefinitely suspended when the fact of such prior reprimand and the reason for it was made known to the Commissioners who heard and reported on matters in connection with charges of subsequent misconduct?

3. Where a state bar association prior to any proceeding obtains the personal banking records of an attorney from banking in which such accounts are maintained, without

the knowledge, consent or permission of such attorney, may such records be introduced in evidence in subsequent disciplinary proceeding involving alleged misconduct of said attorney?

4. Where under Rule of the Supreme Court of Ohio a seventeen (17) member Board of Commissioners is appointed to hear and make findings and recommendations respecting alleged misconduct of attorneys, may such hearing be conducted before only three (3) members when said three (3) members do not report directly to the Supreme Court of Ohio but instead report to the remaining members which do not hear either side to the controversy and which in turn report to the Supreme Court of Ohio?

APPLICABLE CONSTITUTIONAL PROVISIONS, RULE OF COURT, AND CANONS OF PROFESSIONAL ETHICS

This case involves the following:

Constitutional Provisions

1. Amendment IV to the Constitution of the United States more particularly dealing with "unreasonable searches and seizure", which is appended hereto as Appendix D.
2. Amendment V to the Constitution of the United States more particularly dealing with "self incrimination", which is appended hereto as Appendix E.
3. Amendment XIV to the Constitution of the United States more particularly Section 1 thereof, which is appended hereto as Appendix F.

Rule of Court

1. Applicable provisions of Rule XVIII of the Rules of the Supreme Court of Ohio which are appended hereto as Appendix G.

Canons of Professional Ethics

1. Canons 29 and 32 of the Canons of Professional Ethics which are appended hereto as Appendix H.

STATEMENT OF THE CASE

Under Rule XVIII of the Rules of the Supreme Court of Ohio charges were filed against the Respondent covering seven (7) specifications of alleged violations of certain of the Canons of Professional Ethics. The trial was before a panel of three members of the Board of Commissioners of the Supreme Court of Ohio beginning January 5, 1967. The Findings, Conclusions and Recommendation of said Board of Commissioners was certified to the Supreme Court of Ohio on January 9, 1968.

The said Board made conclusions as to the seven (7) charges and in said conclusions found violations of Canon 11 as to charge number 1 and 3 and violations of Canons 29 and 32 as to charges 3, 4, 5, 6, and 7. Said Findings of Fact and Recommendation of the Board was filed with the Board on December 1, 1967.

The charges filed by the Relator, Ohio State Bar Association, with said Board recited of a prior public reprimand issued to Respondent by the Supreme Court of Ohio on December 5, 1962 and said recital included a quotation from said Board in the prior case which read as follows:

> "... that Respondent by the careless handling of business affairs of his office as an attorney-at-law in the handling of collections and his negligence in accounting therefor and by his persistent habit of writing and uttering checks on his various checking accounts, both personal and business, knowing that he did not have funds sufficient to cover them, has been guilty of practices tending to bring the legal profession into disrepute contrary to canons 29 and 32 of the Canons of Professional Ethics."

The above quote was set forth verbatim by said Board in

this Case in its Recommendation and after reciting the above violation in its Recommendation the Board stated as follows:

> "In view of this previous reprimand and the foregoing Finding and Conclusions in respect to charges 1, 3, 4, 5, 6, and 7, the Board finds that the respondent has been guilty of misconduct as defined in Paragraph 5 (a) of Rule XVIII of the Rules of Practice of the Supreme Court of Ohio."

Paragraph 5 (a) of said Rule XVIII defines misconduct and reads in toto as follows:

> "Misconduct shall mean any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude."

Evidence was obtained by Relator, Ohio State Bar Association, and used at the trial herein from banks pertaining to respondent's own personal and business checking accounts. Said records were obtained by the Relator without the knowledge or consent of Respondent.

The substantial part of the case related to the practice of petitioner of issuing post dated checks to pay legal book publishers and certain other creditors with petitioner having explicit understandings with either such creditors or with the banks that should there not be sufficient funds for any particular check that either the bank would notify petitioner who would cover such check or the organization to whom such check was issued could simply add that amount to petitioner's account and re-bill petitioner. The evidence revealed no financial loss to those to whom checks were issued.

The charges in connection with petitioner's checking practices alleged that they tended to bring the legal pro-

fession into disrepute. There was no evidence that such practices had put either the petitioner or the legal profession into disrepute and the evidence, including testimony from the banks on whom such checks were drawn and certain creditors to whom such checks were issued, was to the contrary. The Conclusion of "tending to bring the legal profession into disrepute" was drawn by the commissioners who reported to the Court.

While the trial of the case was before a hearing panel of three (3) members of a seventeen (17) member Board of Commissioners, pursuant to Court Rule, the report to the Supreme Court of Ohio was by the full Board of Commissioners, fourteen (14) of whom did not hear the matter and before whom the petitioner had no opportunity for any presentation.

HOW FEDERAL QUESTIONS PRESENTED

Under Rule XVII of the Rules of the Supreme Court of Ohio, the Board of Commissioners provides a hearing panel of three (3) for matters charging an attorney with misconduct. The full Board of Commissioners then subsequently report to the Supreme Court of Ohio with opportunity at this stage for objections to the findings and or recommendation. It is clear that the Board of Commissioners has not power or authority to invoke penalties of public reprimand, suspension or permanent disbarment.

The federal questions were raised with the Supreme Court of Ohio, which in reality was the Court of first instance, by timely filing of Objections in said Court prior to hearing an oral argument. In addition, before oral argument to the Court, and with the Court's permission supplemental objections and brief in support were filed with the Supreme Court of Ohio. Such objections contained in the certified record of the Supreme Court of Ohio. The Supreme Court of Ohio in its decision, appended hereto, made

no reference to the constitutional questions except Question 2 to which the Court only commented that there was no prejudice to petitioner.

REASONS WHY THIS WRIT SHOULD BE GRANTED

As to Question 1.

Canons 29 and 32 of the Canons of Professional Ethics are so indefinite, uncertain and vague that their application has deprived petitioner of due process of law under Amendment XIV to the Constitution of the United States.

Rule XVIII of the Rules of the Supreme Court of Ohio establishes the disciplinary proceduary to be followed in cases involving charges of misconduct involving attorneys. Subparagraph (a) titled "Misconduct" defines that term and we quote that definition from said Rule XVIII as follows:

> "Misconduct shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, *or any violation of the Canons of Professional Ethics* or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the Commission or conviction of a crime involving moral turpitude." [Emphasis added]

Here there was no criminal conviction. Violation of Canons 29 and 32 were charged based upon check writing practices of petitioner which were not even alleged to be criminal. The relator, The Ohio State Bar Association had previously brought charges against the petitioner D.D. No. 35, alleging the violation of Section 1115.23 of the Revised Code of Ohio which requires that intent to defraud be an element thereof. The Board of Commissioners and the Court in that instance did not find that element present and hence did not find the commission of a crime. How-

ever the Court did find a violation there of Canons 29 and 32 which the petitioner had not even been charged with and which were not even added during the hearing thus making that case fall within the purview of *In re Ruffalo*, (1968), 36 L.W. 4284.

Thus the Relator, the Ohio State Bar Association, in this case simply took what it deemed the easy road and charged only the violation of Canons 29 and 32. In the charges, finding and conclusions of the Board of Commissioners and opinion of the Supreme Court of Ohio the only language used from Canons 29 and 32 is that "such practices tended to bring the legal profession in to disrepute." This being the conclusion drawn by the Board and the Court, though no such evidence of the practices of the petitioner having "tended to bring the legal profession into disrepute is to be found in the record. Thus the Board and the Court used its own subjective processes to arrive at this conclusion.

At this juncture we urge this Court to simply read Canons 29 and 32 of the Canons of Professional Ethics which are set forth in toto in appendix H.

The language of Canons 29 and 32 is commendable as a statement of goals or objectives. But rather than a definite, certain and specific statement of conduct with prohibitions or required standard, these particular Canons read as would a prefacing or introductory statement to the other Canons which generally are of a considerably more definitive character.

Under the auspices of the Ohio State Bar Association Foundation, Professor Oliver Schoeder, Jr., wrote "Lawyer Discipline: The Ohio Story" published in 1967. At page 17 he discusses the formation of a committee in 1952 of the Ohio State Bar Association to draft a rule for disbarment procedures. At page 18 Professor Schroeder quotes from

the Presidential address to the Ohio State Bar Association relating to the proposed rule in part as follows:

> "Restating in clear and concise terms the standards of conduct — standards as high as we all know they ought to be — required of every member of the Bar, whether he holds judicial office or is engaged in private practice and eliminating in the process all canons of conduct which no one has any intention of enforcing and therefore constitute nothing but *beautiful prattle*;"
>
> [Emphasis added]

Notwithstanding this instruction all of the Canons including Canons 29 and 32 remain in force and operative today.

That the need for revision and definition continues is noted in the words of Mr. Justice William J. Brennan, Jr. writing in *American Bar Association Journal*, Vol. 54, February 1968, where he states as follows at page 122:

> "Mr. Justice Stone's warning thirty-three years ago was prophetic: 'Our Canons of Ethics for the most part are generalizations designed for an earlier era.'
>
> "Not only has little been accomplished within the profession to prepare to meet the challenge of today's problems, but the obsolescence of our code of ethics and institutions has dramatically compounded."

Thus, the Relator, the Ohio State Bar Association, chose to charge violation of Canons 29 and 32 because they are literally broad enough to cover everything. Those Canons are so broad and so general and so subject to subjective interpretation that they have become the "catch all" Canons. If an act does not meet all the more specific elements of the other Canons or of criminal conduct then they simply charge on violation of Canons 29 and 32.

The point in the case at hand is well stated in *United States v. Reese*, 92 U.S. 214 from which we quote from page 22 as follows:

> "It would certainly be dangerous if the legislative could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

The extent that Canons 29 and 32 have been used in disciplinary cases in Ohio as of the writing of "Lawyer Disciplinary: The Ohio Story" is found in the statistical review therein and reveals that of 106 cases, 37 cases involved Canon 29, and 32 cases involved Canon 32. The fish "net" is indeed large and effective. The size of the net must now be of grave concern.

This question as to the application of Canons 29 and 32 is an important and substantial question relating to due process of law being afforded all members of the bar. The application of Canons 29 and 32 herein by the Supreme Court of Ohio is analogous to decisions by this Court in declaring statutes or rules unconstitutional and as such is a denial of due process of law which this Court has repeatedly afforded attorneys in disciplinary cases.

The cases are clear that whether the practice of law is termed a right or a privilege, revocation or disciplinary proceedings must afford due process of law under Amendment XIV to the Constitution of the United States. *Spevack v. Klein*, 1967, 87 S. Ct. 625, 385 U.S. 511. *In re Schlesinger*, 1961, 172 A 2d 835, 404 Pa. 584. For review of cases involving "Suspension or revocation of medical or legal professional license as violating due process—federal cases" see 98 L. Ed 851 annotation where at page 852 we quote:

> "All the cases dealt with herein support (most often inferentially, but nonetheless clearly) the view that due process of law plays a fundamental part in situations involving the suspension or revocation of legal or medical licenses. It is not the issue of whether a lawyer or medical practitioner is entitled to due process under these circumstances that has been the subject of judi-

> cial concern, but, instead, whether, as to both matters of substance and matters of procedure, he has, in fact, been afforded such due process."

See also cases relating to admission to the Bar. *Schware v. Board of Bar Examiners of State of N. M.*, 1957, 77 S. Ct. 752, 353 U.S. 232, 64 A.L.R. 2d 288; *Hackin v. Lockwood*, 361 F 2d 499 (1966).

Under the annotation in 98 L. Ed 851, *supra*, section 2 (b), "Vagueness of statutory language", we quote from page 854:

> "If a statute providing for the suspension or revocation of a medical or legal professional license is to meet the test of substantive due process it must be certain in its terms."

More specifically in point is *Czarra v. Board of Medical Supervisors*, 1905, 25 App DC 443, and review of Canons 29 and 32 in light of this decision is invited. There the statute stated as grounds for revocation "Unprofessional or dishonorable conduct." Note the analogy of the language of the charges and conclusions herein to the language of Canons 29 and 32. The Syllabus of the Court, particularly numbers 5 through 10, inclusive, sets forth clearly and in excellent fashion the Court's reasoning and we quote syllabus 7 and 10 as follows:

> "7. The test to determine whether a statute defining an offense is void for uncertainty is whether the language may apply not only to a particular act about which there can be little or no differences, thereby devolving upon the court the exercise of arbitrary power of discriminating between the several classes of acts."
>
> "10. So much of the act of Congress of June 3, 1896, 29 Stat. at L. 198, chap. 313, as authorizes the board of medical supervisors in this District to revoke the license of medical practitioner upon conviction of 'unprofessional or dishonorable conduct', independently of other offenses for which a license may be revoked, is

> void for uncertainty; it being a matter of opinion whether any given act constitutes such conduct; and an order of the board is void which revokes the license of a physician on a complaint charging him with such conduct in that he circulated obscene matter."

The test as to certainty is applied to the statute or in this case Canons 29 and 32, rather than with reference to particular conduct. Thus, the court stated in *Lansetta v. New Jersey*, 1939, 396 U.S. 455 at page 453:

> "It is the statute, not the accusation under it that prescribes the rule to govern conduct and warns against transgression."

In the *Lansetta* case the court cited *Connally v. General Construction Co.*, 269 U.S. 385 and quotes from page 391 of the *Connally* case:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

As to Question 2.

Paragraph (7) of said Rule XVIII has to do with the effect of a prior discipline upon a finding of subsequent misconduct. The last sentence of said paragraph (7) we quote as follows:

> "A person who has been publicly reprimanded for misconduct, *upon being found guilty of subsequent misconduct,* shall be suspended for an indefinite period from the practice of law or permanently disbarred depending upon the seriousness of such misconduct."
>
> (Emphasis added)

In this case the Panel of the Board of Commissioners and said Board had before them formally the fact of a prior reprimand and this fact was set forth in the charges filed by the Relator. That this fact influenced their decision on the merits in connection with the present charges is clearly reflected in the Board's Recommendation where they stated beginning at page 9:

> "In view of this previous reprimand and the foregoing Findings and Conclusions in respect of charges 1, 3, 4, 5, 6 and 7, the Board finds that the respondent has been guilty of misconduct as defined in Paragraph 5 (a) of the Rules XVIII of the Rules of Practice of the Supreme Court of Ohio."

It should be remembered that at this point in these proceedings there had been no finding of "guilty of subsequent misconduct" by this Court. Thus, the Recommendation of said Board is on its face contrary to Rule XVIII, Paragraph (7).

Even more importantly is the prejudicial effect the prior reprimand could not have helped but have on said Panel and said Board in its evaluation of the merits of the instant case.

An important, serious and substantial constitutional question is raised under the due process clause of Amendment XIV to the Constitution of the United States. In upholding the consideration by the Board herein of the prior reprimand before there was an actual determination of misconduct in the instant case the Supreme Court of Ohio has decided the constitutional question in a way not in keeping with the decision of this Court in *Spencer v. Texas*, 385 U.S. 554.

The Supreme Court of Ohio in its decision herein, stated in essence that it found no prejudice to petitioner. How does one expect to find prejuidce? Certainly not by admissions from the triers of fact that they were prejudiced.

The point is that petitioner was entitled to the protection from any prejudicial fact as herein, at least until the merits of the controversy were decided.

The *Spencer* case involved Texas Habitual Criminal Statutes and Justice Harlan in writing the majority opinion stated at page 556:

> "... the essence of those procedures was that, through allegations in the indictment and the introduction of proof respecting a defendant's past convictions, the jury trying the pending criminal charge was fully informed of such previous derelictions, *but was also charged by the court that such matters were not to be taken into account in assessing the defendant's guilt or innocence under the current indictment.*"
>
> (Emphasis added)

The Court split 5-4 with majority holding that defendants were not denied due process when evidence of prior convictions were admitted. However, the Court throughout the majority opinion placed considerable if not controlling emphasis on the limiting instructions given by the courts to juries under this procedure. Justice Harlan states at page 561:

> "The defendants' interests are protected by limiting instructions, see *Giacome v. State, supra,* and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence."

In the case at issue, there were no limiting instructions or considerations. Nor do we think that because lawyers, rather than lay jurors, were the triers of fact here should make a particle of difference. At the risk of being trite, but accurate, we must say that lawyers must be just as susceptible to this kind of prejudicial evidence as others are, particularly where not even subject to the restrictive admonishments as were issued in the Spencer case. Nor

should the fact this is a disciplinary case afford the lawyers lesser protection than in a criminal case. See *Spevack v. Klein, supra.*

While we have pointed out the distinguishing feature of the instant case to the majority view in *Spencer* we urge this Court's examination of the dissenting opinion in *Spencer* of Mr. Chief Justice Warren. We quote Chief Justice Warren at page 570:

> "It seems to me that the use of prior convictions evidence in these cases is fundamentally at odds with traditional notions of due process, not because this procedure is not the nicest resolution of conflicting but legitimate interests of the State and the accused, but because it needlessly prejudices the accused without advancing any legitimate interest of the State."

Justice Brennan in separate dissent states at page 588:

> "It seems to me that the Constitutional error here involved undermined 'the very integrity of the fact-finding process.' *Linkletter v. Walker,* 381 U.S. 618, 639, and I would therefore apply the rule retroactively."

Those words speak more relevantly and eloquently than any we can hope to use.

Further, and making the question here all the more significant and important is the fact that the prior reprimand resulted from findings of the Board of Commissioners that petitioner was in violation of Canons 29 and 32 when in fact he was not even charged with their violation and had no notice of same in that case. Under this Court's decision in *In re Ruffalo, supra,* decided in 1968, petitioner was deprived of due process of law in that case. Thus the use of that prior reprimand additionally compounds the violation of petitioner's rights. We quote from the Board's Findings in the prior case as follows:

> "*Although not made the subject of a specific charge,* the Board further finds that Respondent by the care-

less handling of the business affairs of his office as an attorney at law in the handling of collections and his negligence in accounting therefor and by his persistent habit of writing and uttering checks on his various checking accounts, both personal and business, knowing that he did not have funds sufficient to cover them, has been guilty of practices tending to bring the legal profession into disrepute contrary to Canons 29 and 32 of the Canons of Professional Ethics."

[Emphasis added]

As to Question 3.

The record clearly supports that as regards charges 5 and 6, records of Respondent's own personal, business and trust checking account records in the Ohio Valley Bank and the Commercial and Savings Bank, Gallipolis, Ohio, were placed in evidence through bank personnel under subpoena duces tecum. As relates to these charges no other evidence was introduced by the Relator. It is clear that the information to even formulate these charges was obtained not only prior to hearing but prior to charges even being filed and this information consisted of said bank records obtained by Relator without the knowledge, consent or permission of the Respondent. There was no opportunity for Respondent to protest or raise objection to Relator's obtaining and/or reviewing said records.

Two serious constitutional questions are raised here. First, we think *Spevack v. Klein, supra,* applies here. In *Spevack* the court held that self-incrimination of the Amendment V was absorbed in Amendment XIV to the United States Constitution and extends to lawyers and should not be watered down by the dishonor of disbarment and deprivation of livelihood as penalty. The Court overruled *Cohan v. Hurley,* 366 U.S. 117. Further, the Court stated at page 515:

"In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. Cali-*

> *fornia,* 380 U.S. 609, the imposition of any sanction which makes assertion of the 5th Amendment privilege 'costly' ".

The *Spevack* case was decided January 16, 1967, which was subsequent to the hearing herein. Further, in *Spevack* the court was dealing with a "required records" rule having public aspects though that specific question was not before the court.

Under *Spevack* we believe it clear that the Respondent need not have testified but further had the right to refuse or deny the review of Relator of said bank records in possession of the respective banks and in fact such records were obtained and/or reviewed without even his knowledge.

Moreover, the bank records constituted an invasion of privacy and were in violation of the Amendment IV to the Constitution of the United States. *Zimmerman v. Wilson,* (1936, CA 3d Pa) 81 F 2d 847. In the *Zimmerman* case, internal revenue issued summons with duces tecum clause for the bank to obtain taxpayers' bank records. The Court held an unreasonable search and the action of the bank in furnishing said records could not deprive taxpayer of constitutional protection against unreasonable search. The court stated at page 849:

> "And that right extends to the records of his transactions from unreasonable inspection and examination thereof by unwarranted governmental search."

Evidence obtained by search and seizure in violation of the Fourth Amendment is inadmissible in State Court as a matter of due process. *Mapp v. Ohio,* (1961) 367 U.S. 643, 6 L Ed. 2d 1081, 81 S. Ct. 1684.

As To Question 4.

The question here does not relate to the validity of the commissioner system as such. However, under Rule XVIII

of the Rules of the Supreme Court of Ohio, in particular paragraphs 10 and 14, the actual hearing is before 3 members of the Board of Commissioners who are charged to hear and take evidence and report to the full Board. The full Board of Commissioners is then charged to review and report to the Supreme Court of Ohio. In short, there is no provision for, nor was there here, any direct reporting by the panel members who heard this case to the Supreme Court of Ohio.

A further detailed look at this procedure reveals that under paragraphs 14 and 15 of said rule, as to penalties of public reprimand and above, the full Board certifies its findings of fact and recommendations to the Supreme Court. This Report has behind it the impetus and weight of the full membership of 17 and said Rule makes no provision for minority opinions. As a matter of fact in "Lawyers Discipline: The Ohio Story", *supra*, at page 136 we quote an interesting feature of the operation of said Rule:

> "On numerous occasions divisions of opinions were expressed orally but the Board abided by the majority vote and a formal dissenting opinion was not produced. In November, 1966, the first formal dissenting opinion in the long history of the Board's recommendation to the Supreme Court occurred."

This is the more interesting considering that there are 17 members of the Board. Their propensity for unanimity certainly exceeds that of any multi-member court or quasi-judicial body in our limited experience.

Now, continuing to look at said Rule and its application, there is no provision or opportunity for either side, Relator or Respondent, to make any kind of objection to the report of the three member panel. There is no provision or opportunity for either side to make any presentation orally or otherwise to the full Board and thus no opportunity to raise questions of law or fact or to in any way point to the de-

ficiencies of the record. Indeed, the report of the Hearing Panel to the Board is not even available for review by either party prior to its submission to the Board.

Thus, the Review called for in said Rule, paragraph 14, is a review without any party representation whatsoever. The result, as in this case, is that Respondent is faced with a recommendation of the full 17 member Board of which 14 did not hear the case and of which 14 heard no presentation by or on behalf of the Respondent. Any presentation was by the three member Hearing Panel.

Further, to the best of our knowledge, there was only one transcript of the proceeding available for the Entire Board and much less than 17 briefs that were filed with the Panel for the Board's review. We do not know how much in advance of the Board's meeting for discussion on this case that the Findings and Recommendations of the Hearing Panel were available. However, we do know that the Board met at 1:30 P.M. on December 1, 1967, to consider this case among several others. We know also that the fully prepared, typed and signed Findings and Recommendations of said Board were stamped as being filed on December 1, 1967.

Thus, not only are serious questions raised as to the extent and thoroughness of the Board's review, but as well the total lack of opportunity for Respondent to raise questions at the review stage.

Those cases we are able to find with respect to Commissioners' findings involved direct reporting to the court by the Commissioner or Commissioners who themselves had actually personally heard the evidence and could make first hand evaluation. Additionally, our study of cases providing for review systematically reveal that throughout our entire judicial system review contemplates representation and presentation at the review stage itself. Our inability to find

precedent to the contrary, we believe supports the position taken herein.

The absence of review in the fullest and usual manner and method and the justifiable inference drawn from the record as to the limited extent of review has deprived Respondent of due process of law.

CONCLUSION

This case presents an ideal opportunity for the Court to clarify the question of rights of lawyers in connection with the application of Canons 29 and 32 of the Canons of Professional Ethics and the need for such clarification is we think clear from even a casual reading of those Canons. The need for such clarification is demonstrated by the extent of the application of those Canons as herein.

Additionally important questions pertaining to the application of the Ohio disciplinary rule and the failure to provide lawyers with the same constitutional safeguards as others cries out for review.

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APPENDIX "A"

Ohio State Bar Assn. v. Epling, 15 Ohio St. 2d 23.

Attorneys at law — Misconduct — Acts warranting suspension from practice for indefinite period.

(D. D. No. 83 — Decided June 19, 1968.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

On the fifth day of December 1962, this court administered a public reprimand to the respondent, John A. Epling, based upon a report of the Board of Commissioners on Grievances and Discipline in which, in part, it was found that respondent had been careless and negligent in the handling of the business affairs of his office as an attorney at law; in collections, and accounting therefor, and "by his persistent habit of writing and uttering checks" knowing that he did not have sufficient funds on deposit "to cover them."

The matter now before the court resulted from seven charges of alleged professional misconduct of respondent filed by the Ohio State Bar Association with the Board of Commissioners on Grievances and Discipline for investigation and report. A summary of the charges and findings of the board follows:

Charge No. 1. On or about May 12, 1963, a client employed respondent to collect an account of $53.58. The respondent collected the account in full on November 18, 1963. Respondent failed to account to his client, or make any report to his client. In February 1965, the client forwarded the account to a collection agency and suit was filed. It was not until then that the client learned that respondent had already collected the account. The suit was dismissed.

Though urged by the relator to settle the account with

his client, respondent failed and refused to make any accounting until two days before the board commenced the hearing of these proceedings.

The board found that Charge No. 1 was supported by the evidence and that the respondent was in violation of Canon 11 of the Canons of Professional Ethics which reads:

"Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly * * *."

Charge No. 2. The board dismissed this charge by reason of conflict in the evidence.

Charge No. 3. On or about December 1, 1964, respondent was retained to represent the administratrix of an estate. Respondent arranged for the probate of the will and the appointment of the executrix of the estate. Thereafter respondent transferred funds of the decedent into an estate account, paid certain claims against the estate, distributive shares and respondent's attorney fees. Respondent failed to file any other papers required by law to complete the administration, nor did he do anything further to assist in closing the estate. On January 14, 1966, the respondent was discharged as attorney for the estate and the necessary work was completed by others. Respondent appeared to disregard repeated requests by the court to complete his duties for which he had already been paid. The board found such conduct to be in violation of Canons 11, 29 and 32 of the Canons of Professional Ethics.

Charge No. 4. The conduct of respondent was quite similar in this charge to his conduct in the previous charge. Respondent was retained to advise and assist the executor of an estate in the Probate Court of Gallia County. Respondent assisted the executor in the preparation and filing of the inventory and appraisement, schedule of claims and application to determine inheritance tax and the entry

determining said tax, but failed to close the estate for over two and one-half years, although the executor had paid respondent the amount of the tax and attorney fees in full. The Probate Court had repeatedly urged him to close out the estate, but to no avail. Not until the commencement of these proceedings before the board did he finally finish the administration of the estate.

The board found that the conduct of the respondent under this charge was in violation of Canons 29 and 32 of the Canons of Professional Ethics.

Charges Nos. 5, 6 and 7 involve the drawing and issuing of 209 checks by the respondent and issued by him when he knew that he did not have sufficient funds in his bank to honor them. These checks were issued in the period of time between May 14, 1963, and December 15, 1966. Respondent contended that these checks were post-dated and delivered with the understanding that he would immediately place funds in the bank to cover such checks. It was established that such a procedure was not proper and was in violation of banking regulations. The board found that a substantial number of these checks were eventually dishonored for failure to have sufficient funds to pay them.

The board concluded that such widespread and long continued habit of issuing and uttering worthless checks, as well as the other misconduct of the respondent, tended to bring the legal profession into disrepute within the meaning of Canons 29 and 32 of the Canons of Professional Ethics.

The respondent presented little or no defense other than flimsy excuses for his failure to report collections to his clients and for his failure to perform with reasonable promptness services for which he had already been paid.

Mr. Calvin W. Bristley, Jr., Mr. George D. Young and *Mr. John R. Welch,* for relator.

Mr. James C. Justice and *Mr. William P. Cherrington*, for respondent.

Per Curiam. Respondent complains that the Board of Commissioners on Grievances and Discipline was prejudiced against him by reason of the fact that the board was aware of the former reprimand administered to him by this court. A thorough search of the record discloses that there is no foundation whatsoever for such a contention. On the other hand, the record does disclose that in the single instance where there was a conflict of testimony—Charge No. 2—the board dismissed the complaint.

The objections to the recommendation of the board are overruled, the conclusions and recommendation of the Board of Commissioners on Grievances and Discipline are approved, and it is the judgment of this court that the respondent be, and he hereby is, suspended from the practice of law for an indefinite period.

Judgment accordingly.

TAFT, C. J., ZIMMERMAN, MATTHAIS, O'NEILL, HERBERT, SCHNEIDER and BROWN, JJ., concur.

APPENDIX "B"

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

The Supreme Court of the State of Ohio
Of the Term of January, 1968

To-wit: June 19, 1968

THE STATE OF OHIO, }
} SS
City of Columbus. }

THE OHIO STATE BAR ASSOCIATION,
Relator,

v. D.D. No. 83

JOHN A. EPLING,
Respondent.

It appearing to the Court that the Board of Commissioners on Grievances and Discipline filed its Final Report in this Court on January 9, 1968, recommending that respondent, John A. Epling, should be indefinitely suspended from the practice of law pursuant to Section 6 (b) of Rule XVIII of the Supreme Court of Ohio; and it further appearing that respondent filed objections to the Final Report of the Board of Commissioners on Grievances and Discipline, this cause was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the Final Report of the Board of Commissioners on Grievances and Discipline be, and the same hereby is, confirmed and the respondent, John A. Epling, is indefinitely suspended from the practice of law.

The respondent, John A. Epling, is hereby ordered to cease and desist from the practice of law in any form and is forbidden to appear on behalf of another before any

court, judge, commission, board, administrative agency or other public authority. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each, any and all of the rights, privileges and prerogatives customarily accorded to a member in good standing of the legal profession of Ohio.

It is further ordered that the respondent, John A. Epling, surrender his Certificate of Admission to Practice to the Clerk of this Court forthwith and that his name be stricken from the roll of attorneys maintained by this Court.

It is further ordered that the respondent, John A. Epling, pay the costs of these proceedings taxed in the amount of One-thousand two-hundred eight dollars and ninety-six cents, ($1,208.96).

It is further ordered that the Clerk of this Court issued certified copies of this entry as provided for in Section 19, Rule XVIII of the Rules of Practice of this Court.

APPROVED: /s/ KINGSLEY TAFT, CHIEF JUSTICE

I, Thomas L. Startzman, Clerk of the Supreme Court of the state of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal 48.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 19th day of June, 1968.

THOMAS L. STARTZMAN, CLERK
/s/ SAM F. ADKINS, DEPUTY

APPENDIX "C"

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

Case No. 114

IN RE: JOHN A. EPLING,

Respondent,

vs.

OHIO STATE BAR ASSOCIATION,

Relator.

FINDINGS OF FACT AND RECOMMENDATION OF THE BOARD

This matter came on to be heard before the duly appointed Hearing Panel of the Board of Commissioners on Grievances and Discipline on the pleadings, evidence, exhibits and argument of counsel, all of which have been duly and fully considered by the Board, and upon consideration thereof, the Board makes the following Findings of Fact and Recommendations:

FINDINGS OF FACT

The respondent is an attorney at law duly admitted to the practice of law in the state of Ohio, practicing in Gallipolis, Ohio, and environs.

CHARGE NO. 1

On or about May 12, 1963, respondent undertook to represent Spiegel, Inc., Chicago, Illinois, in the collection of a delinquent account of one Junior H. Prince residing in South Point, Ohio. The amount of the delinquent account was fifty-three dollars and fifty-eight cents ($53.58). Re-

spondent collected the account in full from the debtor on November 18, 1963. Respondent thereafter failed to account to his client, Spiegel, Inc., or to report to them in any way that the account had been collected. On February 3, 1965, Spiegel, Inc. forwarded the same account to a collection agency in Huntington, West Virginia, which instituted action against the debtor on February 17, 1965, in the court of the Justice of Peace in Huntington, West Virginia. Thereupon, Spiegel, Inc. was informed that the account had been paid in full to the respondent and the action against the debtor was dismissed. Spiegel, Inc., then made demand upon respondent for an accounting but respondent had failed to account to his client as of June 3, 1966.

CONCLUSION — CHARGE NO. 1

The facts in Charge No. 1 are undisputed. The evidence introduced further indicated that in addition to the demands made by the client for an accounting after February 1965, an investigator for the Ohio State Bar Association personally talked with the respondent about his failure to account to the client in March 1966 and in November 1966. Respondent failed or refused to account to his client until January 3, 1967, two (2) days before the commencement of this hearing and over three (3) years after respondent had collected the account. Charge No. 1 of the Complaint is therefore supported by the evidence and admissions of the respondent and by such conduct, respondent is in violation of Canon 11 of the Canons of Professional Ethics, to wit:

"Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly."

CHARGE NO. 2

On or about July 14, 1964, respondent was retained by

Mr. and Mrs. Carol Darst of Rutland, Ohio, to attempt to effect the release of their son Harold Darst from the Lebanon Correctional Institution, Lebanon, Ohio. Respondent was paid the sum of five hundred dollars ($500) at the time of his employment. The charge alleges that respondent did nothing to effect the release of Harold Darst and, although demand had been made by the clients, respondent had refused to refund any part of the money paid.

CONCLUSION — CHARGE NO. 2

The testimony of the client and the respondent are in direct conflict. The client stated that the respondent was retained and paid five hundred dollars ($500) to do certain specific things in an effort to have their son released from the Lebanon Correctional Institution and that respondent did nothing. Respondent, however, offered testimony to the effect that he was retained to investigate the possibility of getting the client's son released and that he did make a thorough investigation of the matter, did do considerable legal research concerning the matter and had many conferences with the clients concerning the case.

The testimony does indicate an apparent mutual misunderstanding between the clients and the respondent regarding what was to be done by the respondent in pursuit of this cause and the nature or purpose of the five hundred dollars ($500) retainer fee paid. The testimony further illustrates a lack of proper records on the part of the respondent to show the work done by the respondent and thus justify the fees paid to him but this does not prove that the effort was not expended by the respondent. In view of these factors, the Board finds that the evidence and testimony introduced does not substantiate Charge No. 2.

CHARGE NO. 3

On or about December 1, 1964, respondent was employed

by Vennie Clark Casto of Vinton, Ohio, to represent her in the administration of the estate of Vonnie Clark Hansen, deceased. The will of the decedent was admitted for probate by respondent in the Gallia County Probate Court on January 9, 1965, and Vennie Clark Casto was appointed executrix of the estate. Thereafter, respondent transferred funds of the decedent into an estate account, paid certain claims against the estate, distributive shares and respondent's attorney fee. Thereafter, respondent failed to file the other papers required by law to complete the administration of the estate or to do anything further to assist the executrix even though repeatedly and continuously urged and prompted to do so by the executrix and even the Probate Judge of Gallia County. On or about January 14, 1966, the respondent was discharged as attorney for the estate and the necessary work completed by others.

CONCLUSION — CHARGE NO. 3

The facts of the charge are not in dispute. The estate was not a difficult one to settle, consisting entirely of personal property, a 1962 automobile and four (4) bank accounts. According to the testimony of the probate judge, and the record of the Probate Court in Gallia County, the Inventory and Appraisement in this estate was not filed until January 1966. Shortly thereafter, the application to Determine Inheritance Tax and the Preliminary Notice were filed. The Schedule of Claims and the Final Account was finally filed in February and March 1966, having been prepared by the Probate Court for the executrix. There is nothing in the evidence or testimony to show why this estate could not have been closed within the statutory time. Respondent was continuously and repeatedly urged by the executrix and the judge, over a period of several months, to complete the administration of the estate. Although prom-

ising that he would complete the administration, respondent failed or refused to do so and even refused to surrender his file on the estate to the executrix until informed that the court would send the sheriff after the file (R. 68). In view of these factors, the Board finds that the neglect or inattention of the respondent to his client's business, the respondent's apparent disregard or disrespect of repeated requests by a court, and his failure to perform services for which he had already been paid constitute a violation of Canons 11, 29 and 32 of the Canons of Professional Ethics.

CHARGE NO. 4

On or about November 18, 1962, respondent was employed by one Thomas E. Jones of Crown City, Ohio, to represent him in the administration of the estate of Minnie G. Jones, deceased. Thereafter, respondent obtained the appointment of Thomas E. Jones as executor of the estate in the Probate Court of Gallia County, Ohio, and assisted the executor in the administration, including the filing of the Inventory and Appraisement, the Schedule of Claims and on June 20, 1964, the Application to Determine Inheritance Tax and Journal Entry Determining Tax. Thereafter, although repeatedly and continuously urged and prompted by the executor and the Probate Court to assist the executor in filing his Final Account and although respondent had collected his fee for his services as attorney for the executor on August 17, 1964, respondent failed and neglected to assist the executor in filing the Final Account and to close said estate.

CONCLUSIONS — CHARGE NO. 4

The facts of this charge are not disputed. In addition, the testimony indicated that the Final Account had been signed by the executor in August 1964, as well as a check in payment of the Inheritance Tax due. The Final Account

had been filed and the Inheritance Tax paid on the morning that this hearing commenced to wit: January 5, 1967, approximately two and one-half (2½) years after they were signed. The testimony further indicated that there was no reasonable excuse for respondent's failure to complete the administration of the estate within a reasonable time after the execution of the Final Account. The Board considers two and one-half (2½) years an extremely unreasonable length of time to administer a relatively simple estate, particularly in view of the continued and repeated requests of both the executor and the court to finish the same during that period.

In view of these facts, the Board finds that the neglect or inattention of the respondent to his client's business, the respondent's apparent disregard or disrespect of repeated requests by a court, constitute a violation of Canons 29 and 32 of the Canons of Professional Ethics.

CHARGE NO. 5

That from May 14, 1963, to December 15, 1966, respondent made, uttered, drew and delivered to various persons, and corporations, his checks for the payment of money drawn on the Ohio Valley Bank Company, Gallipolis, Ohio, and that on one hundred twenty-five (125) separate occasions, respondent's checks were not paid by the Ohio Valley Bank Company for the reason that respondent had insufficient funds in his account to cover said checks.

CONCLUSION — CHARGE NO. 5

The facts of the charge are supported by the evidence and testimony and admitted by the respondent. In explanation, respondent states that all of the checks herein involved were post-dated checks given to the particular payee with the admonition that if respondent should not have sufficient

funds available on deposit, the check would not be honored and the respondent would not be held in default by the payees. Respondent did present a representative of one payee book company who testified that the checks given the representative for his company were accepted on this condition. On the basis of the testimony offered, the Board cannot believe that all one hundred twenty-five (125) checks were issued or uttered upon this condition and must conclude that he did issue or utter checks in substantial numbers which were ultimately dishonored because respondent did not have sufficient funds on deposit to cover them when presented for payment. The Board finds that the respondent has violated Canons 29 and 32 of the Canons of Professional Ethics in that he has been guilty of practice which tend to bring the legal profession into disrepute.

CHARGE NO. 6

That from October 19, 1964, to May 9, 1966, respondent made, uttered, drew and delivered to various persons and corporations his checks for the payment of money drawn on the Commercial and Savings Bank, Gallipolis, Ohio, and that on seventy-five (75) separate occasions respondent's said checks were not paid by the Commercial and Savings Bank on the date submitted for the reason that respondent had insufficient funds in his account to cover said checks.

CONCLUSIONS — CHARGE NO. 6

The facts of this charge are substantiated by the evidence and testimony and are admitted by the respondent. In explanation, respondent testified that he had an arrangement with the bank whereby the bank would notify him when a check was presented for which he did not have sufficient funds in his account and that he would immediately arrange to deposit funds to cover the same. The assistant cashier of the Commercial and Savings Bank testified that

the practice of holding checks for money to be collected late was not proper under banking regulations. (R. 175). Disregarding the inherent danger of such an arrangement and the fact that it ignores proper banking procedures and regulations, the evidence and testimony clearly reflects the respondent's apparent disregard of proper business and professional standards in the conduct of his personal business affairs. The Board finds that such a course of conduct does tend to bring the legal profession into disrepute within the meaning of Canons 29 and 32 of the Canons of Professional Ethics.

CHARGE NO. 7

That on or about September 10, 1964, respondent executed and delivered to the Attorney General of Ohio a series of nine (9) post-dated checks drawn on the respondent's account in the Ohio Valley Bank Company, Gallipolis, Ohio, one check in the amount of eighty-two dollars and twenty-two cents ($82.22) dated October 10, 1964, and eight checks in the amount of fifty dollars ($50) dated the 10th day of each succeeding month to and including the date of June 10, 1965. Thereafter, in accordance with respondent's directions, each post-dated check was submitted for payment to the Ohio Valley Bank Company on the date due and all nine checks have been returned to the Attorney General marked returned unpaid for the reasons that respondent had insufficient funds. All nine checks remain unpaid as of the date of filing the Complaint. (The checks were in payment of two Student Loans totaling five hundred dollars ($500) obtained by respondent from Ohio State University in April 1956 and January 1957 and which became delinquent in March 1958. Failing to collect the loans the university had forwarded the claim to the Attorney General of Ohio on November 1, 1961. Respondent repaid fifty dollars ($50) of the total amount due on April 20, 1964.)

CONCLUSIONS — CHARGE NO. 7

The facts of the Charge are uncontroverted and are admitted by the respondent. Respondent again interposed the explanation that he told the representative of the office of the Attorney General, upon giving him the nine checks, that if the checks were not honored when presented for payment, respondent was not to be held in default. However, Mr. Richard Rypma, investigator for the office of the Attorney General, and Mr. Edgar Penwell, chief of the claims section of the Attorney General's office, both denied that the checks were accepted under any such condition. The Board finds that the respondent again issued checks in payment of a debt and did not have or provide sufficient funds in his account to pay the same when presented for payment by the payee. Such conduct does violate Canons 29 and 32 of the Canons of Professional Ethics.

RECOMMENDATION

On December 5, 1962, the Supreme Court of this state administered a public reprimand to the respondent based upon a report of this Board which found in part as follows:

"* * * That respondent by the careless handling of business affairs of his office as an attorney at law in the handling of collections and his negligence in accounting therefor and by his persistent habit of writing and uttering checks on his various checking accounts, both personal and business, knowing that he did not have sufficient funds to cover them, has been guilty of practice tending to bring the legal profession into disrepute contrary to Canons 29 and 32 of the Canons of Professional Ethics."

In view of this previous reprimand and the foregoing Findings and Conclusions in respect to Charges 1, 3, 4, 5, 6 and 7, the Board finds that the respondent has been guilty of misconduct as defined in Paragraph 5 (a) of Rule XVIII of the Rules of Practice of the Supreme Court of Ohio.

It is the recommendation of the Board that respondent be suspended for an indefinite period from the practice of law as provided in Paragraph 6 (b) and Paragraph 7 of Rule XVIII of the Rules of Practice of the Supreme Court of Ohio.

/s/ KARL H. WEANER
Chairman, Board of Commissioners on Grievances and Discipline

/s/ WILLIAM D. RADCLIFF
Secretary, Board of Commissioners on Grievances and Discipline

APPENDIX "D"

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX "E"

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX "F"

Amendment XIV

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "G"

RULE XVIII[2]

Disciplinary Procedure

Pursuant to the powers of this Court over the Bar of this State and the members therof, this rule is amended, as follows, effective on March 11, 1964, and shall apply to all pending cases.

(5) DEFINITIONS.

(a) MISCONDUCT. Misconduct shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude.

(b) MENTAL ILLNESS. Mental illness shall mean the condition defined in Section 5122.01 (A), Revised Code.

(6) MANNER OF DISCIPLINE. Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

(c) a public reprimand, or

(d) a private reprimand.

(7) EFFECT OF DISCIPLINE. A person disbarred shall never thereafter be readmitted to the practice of law in this State. A person who shall have voluntarily surrendered his license

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[2] Same as former Rule XXVII as amended March 11, 1964.

to practice and thereafter has been reinstated in the manner hereinafter provided and a person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

(10) Hearing by Panel of Three Commissioners. After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall be paid by the Secretary of the Board of Commissioners, or taxed as costs.

(13) Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel. If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, suspension for an indefinite period, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses in-

curred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) Review by Entire Board of Commissioners; Board to Administer Private Reprimand. Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15) Public Reprimand; Suspension or Permanent Disbarment; Duty of Board after Review. If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(16) SHOW CAUSE ORDER ISSUED BY THE COURT TO RESPONDENT. On the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by registered mail.

(17) RESPONSE TO ORDER TO SHOW CAUSE AND OBJECTIONS. The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued and a brief in support of such objections, together with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of this Court for original actions.

APPENDIX "H"

Canons of Professional Ethics

"29. Upholding the Honor of the Profession. Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character

or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."

"32. The Lawyer's Duty in its Last Analysis. No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

SUPREME COURT, U. S.
FILED
SEP 24 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 416

JOHN A. EPLING,

Petitioner,

vs.

THE OHIO STATE BAR ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Disciplinary proceedings in Ohio are under the exclusive jurisdiction of the Ohio Supreme Court.

Pursuant to its Rule XVIII the Ohio Supreme Court, as of January 1, 1957, put the investigation of charges against attorneys in the hands of a Board of Commissioners on Grievances and Discipline consisting of 17 lawyers appointed by the Supreme Court, one from each of 17 districts in the state, each to serve a term of three years. Under the Rule, charges are heard by a panel of three members of the Board, are reviewed by the entire Board of 17 and are then heard on brief and oral argument by the Supreme Court of Ohio.

That is the procedure followed in this case. Rule XVIII, is attached hereto as Appendix A, Rule XIX, Rules of Professional Conduct is attached hereto as Appendix B.

This case is stated in the opinion of the Supreme Court of Ohio, *Ohio State Bar Association v. Epling,* 15 Ohio St. 2d 23. (Petitioner's brief, p. 21.) We quote from that opinion.

"On the fifth day of December 1962, this court administered a public reprimand to the respondent, John A. Epling, based upon a report of the Board of Commissioners on Grievances and Discipline in which, in part, it was found that respondent had been careless and negligent in the handling of the business affairs of his office as an attorney at law; in collections, and accounting therefor, and 'by his persistent habit of writing and uttering checks' knowing that he did not have sufficient funds on deposit 'to cover them.'

"The matter now before the court resulted from seven charges of alleged professional misconduct of respondent filed by the Ohio State Bar Association with the Board of Commissioners on Grievances and Discipline for investigation and report. A summary of the charges and findings of the board follows:

"Charge No. 1. On or about May 12, 1963, a client employed respondent to collect an account of $53.58. The respondent collected the account in full on November 18, 1963. Respondent failed to account to his client, or make any report to his client. In February 1965, the client forwarded the account to a collection agency and suit was filed. It was not until then that the client learned that respondent had already collected the account. The suit was dismissed.

"Though urged by the relator to settle the account with his client, respondent failed and refused to make any accounting until two days before the board commenced the hearing of these proceedings.

"The board found that Charge No. 1 was supported by the evidence and that the respondent was in violation of Canon 11 of the Canons of Professional Ethics which reads:

"'Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly * * *.'

"Charge No. 2. The board dismissed this charge by reason of conflict in the evidence.

"Charge No. 3. On or about December 1, 1964, respondent was retained to represent the administratrix of an estate. Respondent arranged for the probate of the will and the appointment of the executrix of the estate. Thereafter respondent transferred funds of the decedent into an estate account, paid certain claims against the estate, distributive shares and respondent's attorney fees. Respondent failed to file any other papers required by law to complete the administration, nor did he do anything further to assist in closing the estate. On January 14, 1966, the respondent was discharged as attorney for the estate and the necessary work was completed by others. Respondent appeared to disregard repeated requests by the court to complete his duties for which he had already been paid. The board found such conduct to be in violation of Canons 11, 29 and 32 of the Canons of Professional Ethics.

"Charge No. 4. The conduct of respondent was quite similar in this charge to his conduct in the previous charge. Respondent was retained to advise and assist the executor of an estate in the Probate Court of Gallia County. Respondent assisted the executor in the preparation and filing of the inventory and appraisement, schedule of claims and application to determine inheritance tax and the entry determining said tax, but failed to close the estate for over two and one-half years, although the executor had paid respondent the amount of the tax and attorney fees in full.

The Probate Court had repeatedly urged him to close out the estate, but to no avail. Not until the commencement of these proceedings before the board did he finally finish the administration of the estate.

"The board found that the conduct of the respondent under this charge was in violation of Canons 29 and 32 of the Canons of Professional Ethics.

"Charges Nos. 5, 6 and 7 involve the drawing and issuing of 209 checks by the respondent and issued by him when he knew that he did not have sufficient funds in his bank to honor them. These checks were issued in the period of time between May 14, 1963, and December 15, 1966. Respondent contended that these checks were postdated and delivered with the understanding that he would immediately place funds in the bank to cover such checks. It was established that such a procedure was not proper and was in violation of banking regulations. The board found that a substantial number of these checks were eventually dishonored for failure to have sufficient funds to pay them.

"The board concluded that such widespread and long continued habit of issuing and uttering worthless checks, as well as the other misconduct of the respondent, tended to bring the legal profession into disrepute within the meaning of Canons 29 and 32 of the Canons of Professional Ethics.

"The respondent presented little or no defense other than flimsy excuses for his failure to report collections to his clients and for his failure to perform with reasonable promptness services for which he had already been paid."

The Supreme Court of Ohio approved the report of the Board of Commissioners on Grievances and Discipline and suspended petitioner from the practice of law for an indefinite period.

QUESTIONS PRESENTED

1. May an attorney be disenfranchised in state court proceedings by reason of the application of Canons 29 and 32 of the Canons of Professional Ethics to the banking practices of that attorney which the court concluded tended to bring the legal profession into disrepute in view of the indefinite, vague and uncertain language of said Canons?

2. Where under Rule of State Supreme Court which provides that an attorney who has once received a public reprimand shall upon being found guilty of subsequent misconduct receive at least an indefinite suspension and said Rule provides that Commissioners hear and report findings and make recommendation to the State Supreme Court, may an attorney be indefinitely suspended when the fact of such prior reprimand and the reason for it was made known to the Commissioners who heard and reported on matters in connection with charges of subsequent misconduct?

3. Where a state bar association prior to any proceeding obtains the personal banking records of an attorney from banking in which such accounts are maintained, without the knowledge, consent or permission of such attorney, may such records be introduced in evidence in subsequent disciplinary proceeding involving alleged misconduct of said attorney?

4. Where under Rule of the Supreme Court of Ohio a seventeen (17) member Board of Commissioners is appointed to hear and make findings and recommendations respecting alleged misconduct of attorneys, may such hearing be conducted before only three (3) members when said three (3) members do not report directly to the Supreme Court of Ohio but instead report to the remaining members which do not hear either side to the controversy and which in turn report to the Supreme Court of Ohio?

ARGUMENT

As to Question No. 1

Question number one is not properly before this court for decision. Petitioner was not "disenfranchised" by the Supreme Court of Ohio solely because that court found that his "banking practices" violated Canons 29 and 32 of the Canons of Professional Ethics. On the contrary, the Supreme Court of Ohio suspended petitioner from the practice of law because,

(1) it found that petitioner's continued habit of issuing and uttering worthless checks violated Canons 29 and 32 of the Canons of Professional Ethics; (charges 5, 6 and 7) and,

(2) his failure to account to his client for money collected violated Canon 11* (charge No. 1); and,

(3) petitioner's neglect of his client's business, and his failure to perform services for which he had already been paid violated Canons 11, 29 and 32 of the Canons of Professional Ethics; (charges 3 and 4) and,

(4) the petitioner's acts of misconduct in this case are repetitions of the acts for which the petitioner was disciplined on December 5, 1962, namely, "careless and negligent handling of the business affairs of his office as an attorney at law; in collections, and accounting therefor," and "by his persistent habit of writing and uttering checks knowing that he did not have sufficient funds on deposit to cover them." (Opinion of the court below approving

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* Canon 11

"The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

"Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

the findings of the Board of Commissioners on Grievance and Discipline, petitioner's brief p. 24).

As to Question No. 2

Petitioner complains that "The Panel of the Board of Commissioners and said Board had before them formally the fact of a prior reprimand and this fact was set forth in the charges filed by Relator." (Petitioner's Brief p. 13) And that this fact "influenced their decision on the merits in connection with the present charges" against him.

The Court below answered this complaint as follows:

"Respondent (Petitioner) complains that the Board of Commissioners on Grievances and Discipline was prejudiced against him by reason of the fact that the Board was aware of the former reprimand administered to him by this court. A thorough search of the record discloses that there is no foundation whatsoever for such contention. On the other hand, the record does disclose that in the single instance where there was conflict of testimony—Charge No. 2—the board dismissed the complaint." (Petitioner's Brief p. 24)

Excepting Charge No. 2, there is no real contest on the facts in the proceedings in the court below. Petitioner's answer to the charges against him admitted most if not all factual allegations in the charges, excepting charge No. 2. Accordingly, the findings of fact of the Board are that the present charges (excepting charge No. 2) are either admitted or undisputed. (Petitioner's Brief p. 27). Therefore, petitioner's complaint that the fact of a prior reprimand "influenced their decision on the merits in connection with the present charges" is without foundation in fact.

Unquestionably the Board of Commissioners on Grievances and Discipline considered the fact of petitioner's prior reprimand in making its *recommendation to the court*

on discipline. In making its recommendation to the Supreme Court of Ohio the board has a duty to consider all of the facts bearing upon petitioner's fitness to continue in the practice of law. In fulfilling that duty the board must consider the prior record of the attorney be it good or bad.

"It is well established that mitigating circumstances may be considered in determining the punishment to be imposed in disciplinary proceedings, such as motives and purposes which actuated the attorney, his previous good record, his characteristics and nature, testimonials as to his good character and reputation or his youth and inexperience and the fact that he was not guilty of intentional wrongdoing.

"If such mitigating circumstances may be considered in alleviating or lightening the penalty does it not follow that incriminating circumstances, such as the previous poor record of an attorney, his years of practice, knowledge of wrongdoing, repeated misconduct, etc., may like wise be considered in determining whether or not a more severe penalty should be imposed? The fact that an offense is a repetition of offenses for which the attorney previously has been disciplined shows that the wrong is not unintentional but is done deliberately with knowledge that such conduct is forbidden and thus merits a greater penalty." *March v. State Bar of California,* 2 Cal. 2d 127, 39 P. 2d 403.

Petitioner does not contend that the Supreme Court of Ohio was prejudiced against him by reason of the fact that that court had knowledge of the fact that it had administered a prior reprimand to him, or that such knowledge influenced the court in making findings against him on the present charges. And, in the final analysis, it is that court that has full responsibility for determining what the facts are and what action should be taken on those facts, *Cleve-*

land Bar Association v. Pleasant, 167 Ohio St. 325, 335, cert. den. 358 U.S. 842, wherein the court said:

> "There can be no question now of the inherent power of this court as to disciplining of attorneys, and, therefore of its power to provide by rule the procedure in reference to hearings upon such questions. That is all that was contemplated in the establishment of the Board of Commissioners on Grievances and Discipline. Such board or its panels have no power to discipline an attorney, except with reference to a private reprimand, and surely that cannot constitute a judgment, for the power to give such a reprimand would be inherent without authorization by this court. As to any other disciplinary action, all that the board can do is investigate and make findings of fact and recommendations and the only order or decision is made solely by this court."

As to Question No. 3

Petitioner states (Petitioner's Brief p. 16): "The record clearly supports that as regards charges 5 and 6, records of Respondent's (petitioner's) own personal, business and trust checking account records in the Ohio Valley Bank and the Commercial and Savings Bank, Gallipolis, Ohio, were placed in evidence through bank personnel under subpoena duces tecum." Petitioner further states that the information to formulate these charges was obtained without his consent, and that he had no opportunity to object to respondent reviewing said records.

Charges 5 and 6 involve the drawing and issuing of 200 checks by petitioner, and issued when he knew he did not have sufficient funds in his bank to honor them. (Opinion of Supreme Court of Ohio, petitioner's brief p. 23)

To these charges petitioner filed his Answer in which he admitted the overdrafts but "contended that these checks were post-dated and delivered with the understanding that

he would immediately place funds in the bank to cover such checks." (Opinion of Supreme Court of Ohio, petitioner's brief p. 23)

In addition to the above admission by petitioner, the record will also show that the bank records covering petitioner's checking accounts were admitted into evidence without objection by petitioner and, in fact, by stipulation of counsel. If petitioner objected to the admission of his bank records into evidence on the ground of privacy or self-incrimination, the time for asserting his objections was when those records were offered as evidence. Petitioner made no such objection and he waived any he had.

Petitioner also contends that this court's decision in *Spevack v. Klien*, 385 U.S. 511, is applicable to these facts.

As we understand the opinions of this court in *Spevack*, essentially this court held that since the Fifth Amendment to the Federal Constitution was now binding upon the States, the penalty of disbarment for invoking it constituted an impermissible denial to lawyers of a constitutional right available to others. Accordingly an attorney against whom there is not one iota of evidence of misconduct may not be disbarred merely for refusing to answer questions or to furnish information upon the grounds of constitutional privilege.

Certainly the *Spevack* case has no application here. The privilege against self incrimination was not invoked. As indicated above the bank records of petitioner's checking account were admitted into evidence without objection and by stipulation of counsel. The record will show that petitioner testified at great length concerning those bank records.

As to Question No. 4

Petitioner complains, (petitioner's brief pp. 17 and 18) that, "under Rule XVIII of the Rules of the Supreme Court

of Ohio, in particular paragraphs 10 and 14, the actual hearing is before 3 members of the Board of Commissioners who are charged to hear and take evidence and report to the full board. The full Board of Commissioners is then charged to review and report to the Supreme Court of Ohio. In short, there is no provision for, nor was there here, any direct reporting by the panel members who heard this case to the Supreme Court of Ohio."

Petitioner also questions the thoroughness of the full Board's review and complains of a lack of an opportunity to appear before the full Board and raise questions. (Petitioner's brief p. 19)

Petitioner contends that the "absence of review in the fullest and usual manner and method and the justifiable inference drawn from the record as to the limited extent of review has deprived Respondent (petitioner) of due process of law."

Petitioner admits, albeit indirectly, (petitioner's brief p. 19) that he filed a brief with the hearing panel which summarized the evidence and presented his position on that evidence. That brief was before the full Board of Commissioners for review.

Due process in disciplinary proceedings requires that the attorney be given notice of the proceeding and an opportunity to defend at a hearing, and that the hearing be essentially fair. *Bradley v. Fisher*, 13 Wall 335, 20 L ed. 646.

We submit that these proceedings before the Supreme Court of Ohio are free from any due process defect. Petitioner was given notice of the charges against him. He was given an opportunity to and did defend himself before the hearing panel of the Board of Commissioners who received the evidence in this case, presented written and oral argument to that hearing panel, written argument to the full Board of Commissioners, and written and oral argument to

the Supreme Court of Ohio stating his objections to the findings and recommendations of the Board of Commissioners. Surely, procedural due process does not require more.

CONCLUSION

There is no reason to analyze the law presented by petitioner in support of his Petition for a Writ of Certiorari. The petitioner had a full and fair hearing before an impartial tribunal, the Supreme Court of Ohio.

The Ohio State Bar Association respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing brief have been mailed by first class mail with postage prepaid to Attorneys for Petitioner, George E. Tyack, James C. Justice and W. P. Cherrington, respectively at their offices.

/s/ SAMUEL T. GAINES
of Counsel for Respondent

APPENDIX A

RULE XVIII[2]

DISCIPLINARY PROCEDURE

Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on March 11, 1964, and shall apply to all pending cases.

(1) Creation of Board of Commissioners on Grievances and Discipline. There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners shall consist of seventeen (17) members of the Bar of this Court, appointed by this Court. One member of such Board shall be appointed from each of the following districts: *District 1,* comprising Butler, Clermont, Clinton, Hamilton and Warren Counties. *District 2,* comprising Darke, Miami, Montgomery, Preble and Shelby Counties. *District 3,* comprising Defiance, Fulton, Hancock, Henry, Paulding, Putnam, Van Wert, Williams and Wood Counties. *District 4,* comprising Lucas County. *District 5,* comprising Crawford, Delaware, Marion, Morrow, Ottawa, Sandusky, Seneca and Wyandot Counties. *District 6,* comprising Champaign, Clark, Fayette, Greene, Logan, Madison and Union Counties. *District 7,* comprising Franklin County. *District 8,* comprising Adams, Brown, Gallia, Highland, Jackson, Lawrence, Pickaway, Pike, Ross, Scioto and Vinton Counties. *District 9,* comprising Coshocton, Fairfield, Knox, Licking, Muskingum and Perry Counties. *District 10,* comprising Ashland, Erie, Holmes, Huron, Lorain, Medina, Richland and Wayne Counties. *District 11,* comprising Portage and Summit Counties. *District 12,* comprising Cuyahoga County. *District 13,* comprising Ashtabula, Columbiana, Geauga, Lake, Mahoning and Trumbull Counties. *District 14,* comprising

[2] Same as former Rule XXVII as amended March 11, 1964.

Carroll, Stark and Tuscarawas Counties. *District 15,* comprising Belmont, Guernsey, Harrison, Jefferson and Monroe Counties. *District 16,* comprising Allen, Auglaize, Hardin and Mercer Counties. *District 17,* comprising Athens, Hocking, Meigs, Morgan, Noble and Washington Counties. The term of office of each member of said Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment. Provided, however, that any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided that his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any cause shall be forthwith filled by appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners, and designate a Secretary, each of whom shall have authority to execute journal entries on behalf of the Board of Commissioners and of panels thereof.

(2) Jurisdiction of Board. The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, make findings and submit recommendations to this Court, as hereinafter provided,

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension for an indefinite period from the practice of law, or judge, or

(b) concerning the mental illness of any attorney and counselor at law or judge, or

(c) relating to petitions for reinstatement as an attorney and counselor of law in this State, or

(d) upon reference by his Court of conduct affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court but did not take place in the actual presence thereof, whether by willful disobedience of any order or judgment of this Court or the Board of Commissioners, by interference with any officer of this Court in the prosecution of any duty, or otherwise.

(3) Referral for Investigation. The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association any matters coming to its attention for investigation, as hereinafter provided.

(4) Application of Rule; Authority and Duty of Local Committees. From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension for an indefinite period or disbarred from the practice of law, and judges; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Any committee authorized by any regularly organized bar association or by the Ohio State Bar Association shall investigate any matter referred to it or which comes to its attention, and may cause a complaint to be filed pursuant to this rule in

cases where misconduct, contempt, or mental illness is found; provided, however, that nothing herein shall affect disciplinary procedures of any regularly organized bar association under the provisions of its constitution not inconsistent with this rule.

The Board of Commissioners or any member thereof, the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, and the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State may call upon any attorney and counselor at law or judge in the State to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such attorney and counselor at law or judge shall neglect or refuse so to assist in any such investigation or so to testify.

(5) Definitions.

(a) Misconduct. Misconduct shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude.

(b) Mental Illness. Mental illness shall mean the condition defined in Section 5122.01 (A), Revised Code.

(6) Manner of Discipline. Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

(c) a public reprimand, or

(d) a private reprimand.

(7) Effect of Discipline. A person disbarred shall never thereafter be readmitted to the practice of law in this State. A person who shall have voluntarily surrendered his license to practice and thereafter has been reinstated in the manner hereinafter provided and a person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

(8) The Complaint; Where Filed; By Whom Signed. A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to rep-

resent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint, and shall constitute the authorization of such counsel to represent said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

(9) Duty of the Board Upon Filing of the Complaint.

(a) Notice to Respondent. The Secretary of the Board of Commissioners shall send a copy of the complaint by registered mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and to serve copies thereof upon counsel of record named in the complaint.

(b) Suspension of Right to Practice Pending Disposition of Misconduct Complaint. After an answer has been filed or the time for answer has elapsed, the Court shall entertain such recommendation as the Board may make for the immediate suspension from the practice of law pending disposition of the complaint if the complaint alleges the conviction of a crime involving moral turpitude supported by a certified copy of the judgment entry of the Court convicting the Respondent.

(c) Mental Illness Suspension. After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination as provided in (d) hereof, the Board shall forthwith certify the com-

plaint to this Court and the Court may suspend the Respondent from the practice of law.

(d) Examination. If the complaint or answer alleges existing mental illness unsupported by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

(e) Termination. Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Court.

(10) Hearing by Panel of Three Commissioners. After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall be paid by the Secretary of the Board of Commissioners, or taxed as costs.

(11) Dismissal of Complaint. If the panel finds that the complaint or evidence is insufficient, the panel shall make its certified report of the proceedings and recommendations

to the Board of Commissioners which shall review the proceedings, and shall dismiss the complaint, or refer the matter back to the panel for further hearing or the administering of a private reprimand, or may proceed upon the certified report of the proceedings before the panel. The Secretary of the Board of Commissioners shall give notice of a dismissal to the Respondent, all counsel of record, the Ohio State Bar Association, and the local bar association or associations of the county or counties in which the Respondent resides and maintains his office, and of the county or counties from which the complaint arose.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

(12) Private Reprimand; Duty of Panel. If the panel finds and determines that the Respondent is guilty of misconduct and that private reprimand should be administered, such panel shall administer such reprimand and such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by such panel.

If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

(13) Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel. If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, suspension for an indefinite period, or permanent disbarment is merited, the panel shall make its certi-

fied report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) Review by Entire Board of Commissioners; Board to Administer Private Reprimand. Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15) Public Reprimand; Suspension or Permanent Disbarment; Duty of Board After Review. If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this

Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(16) Show Cause Order Issued by the Court to Respondent. On the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by registered mail.

(17) Response to Order to Show Cause and Objections. The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of this Court for original actions.

(18) Answer Briefs. Answer briefs together with proof of service shall be filed within fifteen (15) days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by rules of this Court for original actions.

(19) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order. After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may

find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Ohio State Bar Association, to the local bar association or associations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio; the United States Court of Appeals for the Sixth Circuit; and to the Supreme Court of the United States.

If a disciplinary order of the Court provides for a public reprimand, the Clerk of this Court shall arrange for publication thereof in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

If a disciplinary order of the Court provides for a permanent disbarment or suspension for an indefinite period from the practice of law, the Clerk of this Court shall arrange for publication thereof in the official reports of this Court, in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

(20) Proceedings Private; Exceptions. All proceedings and documents relating to complaints and hearings thereon and proceedings in connection therewith shall be private except

(a) Where the Respondent shall request in writing that they be public, or

(b) Where proceedings filed with the Supreme Court

of Ohio recommend the discipline of permanent disbarment or suspension for an indefinite period, or

(c) Where any disciplinary matter is heard by the Supreme Court of Ohio, other than in conference, on objections to the findings or recommendations of the Board of Commissioners.

(A copy of the findings, recommendations and actions of the Panel and the Board of Commissioners in each case shall be given to any member of the Court upon request.)

(21) Petition for Reinstatement. No petition for reinstatement to the practice of law shall be entertained by this Court and the same may not be filed in this Court, within a period of two (2) years after the entry of an order suspending for an indefinite period the Petitioner from the practice of law in this State, or within a period of two (2) years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

(22) Contents of Petition for Reinstatement. Subject to the foregoing restrictions, any person who has been suspended for an indefinite period from the practice of law and who wishes to be reinstated may file his verified petition and twenty (20) copies thereof with the Clerk of this Court, setting forth

(a) the date when such suspension was ordered, and if there was a reported opinion, the volume and page of the official reports of this Court where such opinion appears;

(b) the dates all such prior petitions for reinstatement were filed, denied or granted;

(c) the names of all persons and organizations, except the Petitioner and the Board of Commissioners, who were, or would be, entitled, under this Rule, to receive from the Clerk of this Court certified copies of the disciplinary order of this Court against Petitioner resulting in his suspension; and the name of the local bar association or asso-

ciations in the County in which he resides at the time of the filing of the petition and of each County in which he proposes to maintain an office if reinstated; and

(d) the facts upon which he relies to establish by clear and convincing evidence that he possess all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against him.

(23) Costs to be Deposited with Petition for Reinstatement. Such petition shall be accompanied by a deposit in an amount to be fixed by the Clerk, for probable costs and expenses to be incurred in connection with said proceedings, which shall include any amounts unpaid under any prior order of this Court.

(24) Requisites for Reinstatement. No person shall be reinstated unless he has established by clear and convincing evidence that he possess all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against the Petitioner. In such case the order of reinstatement may be conditioned upon the Petitioner's subsequently taking and passing a regular bar examination of this Court and thereafter taking the prescribed oath of office.

Paragraphs C and D of Section 6 of Rule XVII shall not apply to any petitioner with respect to whom such an order of reinstatement may have been issued.

(25) Petition for Reinstatement Referred to Board of Commissioners. Unless denied forthwith for insufficiency

in form or substance, the Clerk shall forward five (5) copies of the petition to the Secretary of the Board of Commissioners and such petition shall be deemed to be referred, without court order, to the Board of Commissioners to hold a hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

(26) Hearing of Petition by Panel of Three; Hearing Shall Be Public; Who May Appear; Appeal to Court From Denial of Petition by Board of Commissioners. The Chairman of the Board of Commissioners shall appoint a hearing panel of three (3) Commissioners no one of whom shall be a resident of the district in which the Petitioner resides or of the district in which he resided at the time of his suspension and said panel shall conduct a hearing or hearings upon such petition. Reasonable notice of any hearing shall be given to the Petitioner or his counsel and to all persons or organizations referred to in Section (22) (c). Such hearing shall be public. Any interested person, any member of the Bar, and any representative of any local bar association or of the Ohio State Bar Association may appear before the hearing panel in support of or in opposition to the petition.

The hearing panel shall make and certify a report of the proceedings before it, including its findings of fact and recommendations, to the Board of Commissioners; and all proceedings before such panel and the Board of Commissioners shall, whenever appropriate, be governed by the provisions hereinbefore contained governing disciplinary proceedings, including proceedings in this Court or an issuance of an order to show cause why the final report of the Board of Commissioners should not be confirmed.

The Board, in its discretion, may recommend that the Petitioner be required to take and pass one of the regular bar examinations as a condition to readmission. If the final report should recommend denial of the petition, the Petitioner shall have ten (10) days from receipt of notice of the date of filing such report to file objections thereto and brief in support thereof.

If the final report should recommend granting of the petition any person or organization referred to in Section (22) (c) shall have ten (10) days from the receipt of notice of filing of such report to file objections to the recommendations and brief in support thereof. The Court shall thereupon enter an appropriate order, which may include such provisions for reimbursement of the costs and expenses incurred in connection with the proceedings as the Court shall deem just.

(27) Manner of Service of Notices, etc. Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Respondent or Petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such Respondent or Petitioner, either personally or by registered mail.

(28) Quorum of Panel or Board. A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

(29) Clerk is Agent for Service of Notices on Non-resident Attorney. Any nonresident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, or any resident of this State, having been admitted as an attorney and counselor at law by the rules

of this Court, who subsequently becomes a nonresident or conceals his whereabouts, by such admission to the practice of law within this State makes the Clerk of this Court his agent for the service of any notice provided for in any proceeding instituted before the Board of Commissioners against such attorney and counselor at law or judge, pursuant to this Rule.

(30) Manner of Service on Clerk; Record of Such Service Not a Public Record. All such notices shall be served by the Secretary of the Board of Commissioners upon the Clerk of this Court by leaving at the office of said Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by registered mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the service upon said Clerk of this Court, addressed to such Respondent at his last known address. The postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of this Court shall keep a record of the day and hour of the service upon him of such notice and any accompanying document, which shall not be a public record in the office of said Clerk.

(31) Power to Issue Subpoenas. In investigations and proceedings under this rule, upon application by the Chairman, Vice Chairman, Secretary, or Counsel of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or by the President, Secretary or Chairman of the Grievance Committee of any regularly

organized local bar association in the state authorized to sign a certificate under Section (8) hereof, or by the Respondent or Relator, each member of the Board of Commissioners and its Secretary shall have power to issue subpoenas and to cause testimony to be taken under oath before the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or any subcommittee thereof, or before the Grievance Committee of any regularly organized local bar association in the State, or before a hearing panel of the Board of Commissioners. All such subpoenas shall be issued in the name and under the seal of this Court and shall be signed by a member of the Board of Commissioners or its Secretary and served as provided by statute.

(32) May Order Depositions. The Secretary of the Board of Commissioners may order testimony of a witness to be taken by deposition within or without this State in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

(33) Effect of Refusal to Testify. The refusal or neglect of the person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of this Court and shall be punishable accordingly.

(34) Rules of Evidence. All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

(35) Docket of Complaints. The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the records of his office.

(36) Board May Prescribe Rules. The Board of Commis-

sioners may, subject to the prior approval of this Court, adopt other rules and regulations not inconsistent herewith.

(37) Rule to be Liberally Construed. The process and procedure under this Rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report or order to show cause may be made at any time prior to final order of the Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any non-prejudicial irregularity or for any error not resulting in a miscarriage of justice. This Rule and such regulations relating to investigations and proceedings involving complaints of misconduct and petitions for reinstatement shall be liberally construed for the protection of the public, the Courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this Rule. To the extent that application of this amended Rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended Rule becomes effective shall continue to apply.

APPENDIX B

RULE XIX[3]

RULES OF PROFESSIONAL CONDUCT

Section 1. These rules of professional conduct shall be binding upon all members admitted to practice law in the State of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment, as provided in Rule XVIII of the Rules of Practice.

The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association as amended are adopted; and nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof. (The Canons of Professional Ethics were adopted November 13, 1952, and are set forth in 175 Ohio State Reports. The Canons of Judicial Ethics as amended were adopted January 27, 1954, and are set forth in 160 Ohio State Reports.)*

Section 2. An attorney at law shall not advertise or otherwise solicit professional employment. This rule shall not apply to the publication or use of ordinary professional cards or conventional listings in legal directories and newspapers.

Section 3. An attorney at law shall not employ another to solicit or to obtain or remunerate another for soliciting or obtaining professional employment for him.

Section 4. An attorney at law shall not acquire an interest adverse to a client in a subject matter concerning which the attorney has been employed.

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[3] Same as former Rule XXVIII.

* Canons of Professional and Judicial Ethics are set forth also in 176 Ohio State Reports.

Section 5. An attorney at law shall not, directly or indirectly, without the consent of his client, purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which he appears as attorney for a party.

Section 6. An attorney at law shall not represent conflicting interests except with the consent of all parties concerned.

Section 7. An attorney at law shall not accept professional employment without first disclosing to his prospective client his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment.

Section 8. An attorney at law shall not accept employment adverse to a client or former client relating to a matter in reference to which he has obtained confidential information by reason of and in the course of his employment by such client or former client.